IN THE

Supreme Court of the United States

Writ of Certiorari to the Supreme Court of the State of California

---

Brief of American Civil Liberties Union of Southern California for Leave to File Brief Amicus Curiae and Brief

---

SUBJECT INDEX

	PAGE
Motion for Leave to File Brief Amicus Curiae	1
Brief of American Civil Liberties Union of Southern California, Amicus Curiae	5
The decision by the court below deprives petitioner of freedom of speech and due process rights	5
Conclusion	14

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Barenblatt v. United States, 360 U. S. 128	2, 3
Bates v. Little Rock, 361 U. S. 516	6, 9, 12, 13
Beilan v. Bd. of Education, 357 U. S. 399	2, 3, 6, 7, 10, 12
DeJong v. Oregon, 299 U. S. 353	12
Dennis v. United States, 341 U. S. 494	6
Kent v. Dulles, 357 U. S. 116	10
Konigsberg v. State Bar, 353 U. S. 252	12
Lerner v. Casey, 357 U. S. 468	2, 3, 6, 7, 10, 12
National A. A. C. P. v. Alabama, 357 U. S. 451	2, 6, 9, 10, 13
Schware v. Board of Bar Examiners, 353 U. S. 232	10, 12
Speiser v. Randall, 357 U. S. 513	10
Sweezy v. New Hampshire, 354 U. S. 234	8
Talley v. California, 362 U. S. 60	2, 5, 9, 12, 13
Yates v. United States, 354 U. S. 298	6, 11, 12, 13

STATUTES

California Business and Professions Code, Sec. 6064.1	13
United States Constitution, First Amendment	6, 7, 8, 9, 11
United States Constitution, Fourteenth Amendment	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 28

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and the COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The American Civil Liberties Union of Southern California respectfully requests permission to file the within Brief Amicus Curiae in support of petitioner's position in the above entitled cause.

Counsel for applicant have read the record at bar and have familiarized themselves with the arguments presented by the parties hereto.

This applicant is devoted to the protection and support of the civil liberties and rights of all persons, irrespective of their politics, status, origin or of the nature of the crime charged. The Union believes that the free exchange of ideas, the freedom to express them

and discuss them with others, is absolutely fundamental to a democracy. For government to penalize lawful speech, even indirectly, not only deprives society of new ideas, but sets us on a course paralleling the very ideologies which we oppose. Therefore, the A. C. L. U. believes free speech to be the most compelling societal interest unless and until uttered under circumstances which afford no reasonable time to reply.

Pursuant to leave of this Court, the undersigned filed herein an amicus brief in behalf of the American Civil Liberties Union in support of the Petition for Writ of Certiorari. The brief pointed out that, by standing upon petitioner's refusal to disclose his associations rather than upon the record as a whole, California had chosen an unfair method of disqualifying Konigsberg from the practice of law.

The American Civil Liberties Union believes, however, that a more fundamental issue posed by this case —and which is a point only touched on in petitioner's opening brief—lies in where the line is to be drawn between individual freedom and State action.

It cannot be earnestly disputed that the questions which petitioner refused to answer intruded on his privacy. This fundamental right, while recognized by this Court in *N. A. A. C. P. v. Alabama*, 357 U. S. 451 and *Talley v. California*, 362 U. S. 60, was denied protection in *Lerner v. Casey*, 357 U. S. 468, *Beilan v. Board of Education*, 357 U. S. 399 and *Barenblatt v. United States*, 360 U. S. 128. The decisive point of

departure between these cases is left in doubt chiefly because this Court has attempted to define the limits of the societal interest on a case-by-case basis.

This policy, as the decision of the California Supreme Court in the instant case reflects, has caused considerable confusion and misunderstanding as to the limitations on the police power in relation to constitutionally protected speech.

Moreover, the emphasis given in the *Barenblatt—Lerner*—and *Beilan* cases to societal interests, particularly when invoked by inquisitorial bodies, has been largely at the expense of civil liberties. This constitutional philosophy ignores the basic reality that societal rights in a democracy are co-extensive with individual rights. But what is far more serious in the "balance-of-interests" approach, because it is subjective, is that it invites legislative and judicial restraints upon speech—even "while this Court sits."

Because California's judiciary and Bar have construed this Court's decisions so as to transgress upon petitioner's privacy, and because there is a need to discuss the constitutional policies and rationale which appear to have given rise to such transgression, the American Civil Liberties Union respectfully requests leave to file the within brief in support of petitioner's position.

Respondents have not consented to the filing of the attached brief but their counsel have advised counsel for the applicant that they will not object to the filing.

reserving the right to reply if they deem such to be in
dicated.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

HUGH R. MANES,

Attorneys for American Civil Liberti
Union of Southern California, Amicu
Curiae.

IN THE

Supreme Court of the United States

October Term 1960

No. 28

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and the COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALFORNIA, AMICUS CURIAE.

The Decision by the Court Below Deprives Petitioner of Freedom of Speech and Due Process Rights.

California has denied petitioner a license to practice law solely because of his refusal to disclose whether or not he had ever belonged to the Communist Party.

Recently, this Court held that a municipality could not arbitrarily compel a citizen to put his name to every idea he espoused or distributed (*Talley v. California*, 362 U. S. 60). And earlier, this Court, acknowledging the "close nexus" existing between free speech and the privacy of one's opinions, denied that Alabama could

compel a private association to disclose the names and addresses of its members (*N. A. A. C. P. v. Alabama*, 357 U. S. 451, 460; see also: *Bates v. Little Rock*, 361 U. S. 516).

Therefore, it cannot be seriously denied that California here abridged petitioner's freedom of speech and assembly, as well as the right of others to hear and discuss his ideas (See: *Dennis v. United States*, 341 U. S. 494; *Yates v. United States*, 354 U. S. 298). Hence, the crucial issue posed by this case—as by other speech cases—is whether the State may circumscribe speech protected by The First Amendment. In putting the issue thusly, we are mindful of this Court's opinions in *Lerner v. Casey*, 357 U. S. 468 and *Beilan v. Board of Education*, 357 U. S. 399; on which the California Supreme Court leaned so heavily in this case (52 Cal. 2d 769, 773). Those decisions appear to uphold the right of a state—as an employer—to discharge, under a theory of incompetency or lack of candor, a public employee who fails or refuses to disclose, upon demand, past or present membership in the Communist Party. While the *Lerner* and *Beilan* cases obviously do not control the case at bar, the rationale upon which they are based, is corroding The First Amendment, even as it has here misled the California Supreme Court and the State Bar.

To compel disclosure of beliefs and associations by economic pressure differs not too much from extracting them by the rack and screw. If the one method be more "civilized," it is not the less offensive to a democratic society. For it is the *threat* of ruin or adversity more than the punishment itself that induces silence and conformity.

That freedom is not absolute is a mere truism which should not be invoked to justify procedures which deprive The First Amendment of meaning. The objective of a democratic society is to encourage freedom rather than to treat it as a menace, or entrust it only to those willing to submit a daily accounting of their political activities.

The test is not, as declared in the *Lerner, Beilan* cases, whether State intrusion on liberty is rational, or that it comes "encased in the armor" of a more compelling societal interest. It is not for the Courts or legislatures to decide which ideas will save democracy, and which will destroy it. That judgment is reserved exclusively for the forum of public opinion.

California's interest in protecting the integrity of its judicial processes, however laudable, rational or important, cannot be said to supersede the national interest in safeguarding the channels of communication and promoting the free exchange of ideas. Indeed, it is to such a premise that democracy is anchored.

Moreover, the "balance-of-interest" test provides no reasonable notice either to the State or to the citizen as to the limits of constitutionally protected dissent. The boundaries of liberty cannot be left to legislative experimentation, conceived in an "atmosphere of cold war and hot emotions." Nor should the citizen be expected or required to prophesy which opinions or associations he may safely indulge in without risking his reputation or his job.

The freedom to exchange ideas presupposes, of course, the *opportunity* to do so. Goverment can, and must, preserve that opportunity. A substantial and imminent threat thereto justifies state intervention. Not,

however, just a "remote or shadowy threat" (concurring opinion, *Sweezy v. New Hampshire*, 354 U. S. 234, at p. 265), but a danger which manifestly precludes a reasonable opportunity for effective debate.

This does not deprive California of the right to punish a call to unlawful action by methods which afford the accused due process of law. The point is, however, that neither those facts, nor those methods for ascertaining them, are to be found in this record.

It is not, that the "clear and present danger" test is novel or unique—for of course, it is not; but rather that the times in which we live are thought by some to require a restraint in its application, if not its outright modification.

It is fair to consider whether political conditions as they existed in 1793 appeared less ominous to those who adopted The First Amendment without inserting qualifications to govern its operation.

But even if it be true that Communism and modern weaponry have, as never before, brought civilization to the brink of catastrophe, we cannot believe that the rational and purpose of The First Amendment has become less valid. Surely, in times of world tension our national security lies not in emulating the error of despotic government, but in providing a favorable climate for new ideas and reasonable minds in which to fertilize them. The existence of heretical ideologies does not warrant the exchange of humanitarian principles for hollow platitudes. Freedom is a way of life, not just a civics lesson. Certainly there are risks in preserving it in the form envisioned by our Constitutional forefathers. But these are risks which they chose out of their fierce belief in human dignity; and because experi-

ence had taught them that such risks were infinitely preferable to securing government against the governed.

We cannot suppress the advocacy of dissident doctrines without acknowledging that freedom is impractical when heresay lurks. But when does it not? Must we endure modified versions of freedom—or none at all—until the historic struggle between totalitarianism and humanism has ceased? Is liberty invariably the slave of perilous times—or its hope? The answers, we respectfully submit, will not await a factual analysis of the cases which come to this Court, but rather must be found in the tenets and history of the Bill of Rights.

Only rarely are civil liberties attacked these days by frontal assault. States have learned more modern techniques for suppressing unorthodox opinions, such as by arousing public antipathy toward their adherents. Yet, it is precisely at that point that The First Amendment fulfills its pledge. For freedom of speech does not mean the right to talk to one's self, nor can it be effectively exercised if the advocate is circumscribed by a cordon of economic sanctions. As this Court observed in *N. A. A. C. P. v. Alabama, supra,* at p. 460:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."

Obviously, the right to dissent is illusory if the dissenter must expose himself and others to reprisal and vilifications. Hence, the freedom to discuss ideas with others carries with it the right to be silent about such matters (*N. A. A. C. P. v. Alabama, supra; Talley v. California*, 362 U. S. 60; *Bates v. Little Rock*, 361 U. S. 516).

It follows that the State's interest in one's associations does not become compelling in the absence of evidence that he has engaged in conduct requiring an explanation.

Yet—even without such evidence—the majority opinions in the *Lerner* and *Beilan* cases seem to have found the interest of the State *qua* employer more compelling than the employee's privacy, thereby leaving the impression that a public employee owes a greater duty of candor to his employer than a citizen owes to his government (Compare *Speiser v. Randall*, 357 U. S. 513; *N. A. A. C. P. v. Alabama*, 357 U. S. 451). To intimate that the liberties enjoyed by a citizen become somehow a threat to the security of the State when invoked by him as its servant defies understanding. If the State cannot relieve itself of the burden of confronting a taxpayer with evidence of unlawful speech (*Speiser v. Randall, supra*), how can it do so merely because the latter is a public employee? If government cannot abridge the speech rights, even indirectly, of a veteran (*Speiser v. Rahdell, supra*), or of a passport applicant (*Kent v. Dulles*, 357 U. S. 116), or of an attorney (*Schware v. Board of Bar Examiners*, 353 U. S. 232), then how does it become possible for it to do so where the rights involved are those of a teacher or a municipal subway conductor? Is the information obtained by the State as employer unavailable to the State as prosecutor? Does the Constitution contain a reservation clause specifically exempting those in public service from it's protection?

Either speech is lawful, or unlawful. If there is time to answer, if the advocacy falls short of incitement, it is lawful irrespective of whether the advocate

is in government's employ, or simply a citizen thereof. (*Yates v. United States*, 354 U. S. 298). If the speech is lawful, The First Amendment, subsumed in The Fourteenth, forbids its curtailment by State action. To hold that infringement of speech is contingent on the *occupation* or *status* of the advocate, rather than his *conduct*, not only deprives him of equal protection of the laws, but simply invites the State to exercise powers expressly withheld by The First Amendment.

It is difficult to comprehend how the police power can be exercised rationally if it is denied the State altogether. But to concede to the State the power to inquire into beliefs and associations does not help to explain how the exercise of such power—particularly on a record such as this—will afford the State any greater measure of security. It is unlikely that a faithless employee will be retained by government regardless of how he answers its questions. Moreover, he is still in a position as a lay citizen to subvert the State—if that is truly his objective.

In short, to seek security by means of loyalty oaths and inquisitions is an illusion—especially if such devices are not applied to everyone. The latter approach would at least have the virtue of consistency, even as it would obviate the troublesome pretense that security is possible in a free society.

However, oaths and inquisitorial bodies have been notoriously inefficient in preserving the heads and thrones of despots. It is unlikely, therefore, that such instruments will be any more effective in a democracy. They will, of course, encourage conformity and create an atmosphere of suspicion, mistrust and fear. And while this does serve the purposes of tyranny, it is an

anomaly in a society which professes to treat the individual with dignity and humanity—and where he is supposed to have a voice in the control of his destiny.

For these reasons, it is respectfully submitted that the *Lerner* and *Beilan* decisions should be reconsidered, thereby freeing public employees—and all other citizens—to pursue happiness along paths other than those illuminated by government.

In any event, notwithstanding the rationale or the holding in the *Lerner—Beilan* cases, the State nevertheless bears the burden of justifying its encroachment upon petitioner's liberty (*Bates v. Little Rock*, 361 U. S. 516, 524; see: concurring opinion in *Talley v. California*, 362 U. S. 60, at pp. 66-67). Obviously, the State has not borne that burden here.

Petitioner categorically denied that he had ever advocated the overthrow of government by force or violence, or that he was ever a knowing member of an organization that did [1960 R. 20-21; 28]. While there is the testimony of an ex-Communist to the effect that petitioner attended some Communist Party meetings in 1941, this Court noted of such evidence in the earlier *Konigsberg* case:

> "Her testimony concerned events that occurred many years before and her identification of Konigsberg was not very convincing." (353 U. S. 252, 267).

Moreover, such testimony, standing alone, is not evidence that Konigsberg advocated the forceful overthrow of government (*Schware v. Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar, supra*; Compare: *DeJong v. Oregon*, 299 U. S. 353; *Yates v. United States*, 354 U. S. 298); and therefore is not a

sufficiently compelling interest to justify California's intrusion into petitioner's privacy (*Talley v. California*, 362 U. S. 60; *Bates v. Little Rock*, *supra*, *N. A. A. C. P. v. Alabama*, 357 U. S. 451).

The record, since its departure from this Court in 1957, is enhanced only by further testimonials to petitioner's good moral character, loyalty and integrity [1960 R. 11-14; 39-50]. Significantly, the State Bar's investigator could apparently produce no further evidence either of petitioner's affiliation with the Communist Party, or his espousal of unlawful doctrines [1960 R. 38].

Nevertheless, the State Bar contends that petitioner has frustrated its inquiry by refusing to disclose whether or not he was a member of the Communist Party. On this record, such disclosure would prove nothing.

Section 6064.1 of the Business and Professions Code bars admission only for preaching the overthrow of government by force or violence, not for mere membership in the Communist Party. Accordingly, membership or even active participation therein cannot be equated with, or justify an inference of advocacy of the doctrines denounced by Section 6064.1 (*Yates v. United States*, *supra*, at pp. 328-331).

There is no California statute or regulation which authorizes the State to withhold a license from a lawyer because the question goes unanswered. Furthermore, the record is devoid of evidence of conduct or speech such as might entitle the State to an explanation. Yet, California insists on one, even though failing to show a compelling interest therein. Accordingly, its refusal to admit petitioner to the California Bar is arbitrary and a denial of due process of law.

Conclusion.

The decision of the California Supreme Court should be reversed with directions to admit petitioner to the State Bar.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
HUGH R. MANES,
Attorneys for American Civil Liberties Union of Southern California, Amicus Curiae.